California
Fair Political
Practices Commission

August 4, 1989

Charles H. Bell, Jr.
Nielsen, Merksamer, Hodgson,
Parinello & Mueller
770 L Street, Ste. 800
Sacramento, CA 95814

Re: Your Request for Informal Assistance
Our File No. I-89-370

Dear Mr. Bell:

You have requested advice concerning the campaign provisions of the Political Reform Act.[1] Because your request is a general inquiry, we consider it to be a request for informal assistance pursuant to Regulation 18329(c).[2]

QUESTION

What are the obligations of treasurers to obtain affiliation information from contributors for purposes of campaign reporting and to ensure that contributions from affiliated entities are within the contribution limitations imposed by Proposition 73?

CONCLUSION

A committee treasurer has a duty to inquire concerning affiliation if he or she has reason to believe that the contributions received from two or more entities must be

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1 Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

2 Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

aggregated. In most cases, if the treasurer is keeping the detailed accounts and records required for purposes of timely and accurate disclosure of campaign receipts and expenditures, he or she should rarely be required to obtain additional information from contributors.

ANALYSIS

The provisions of Proposition 73, adopted by the voters in the June 1988 primary election, impose limitations on contributions received by candidates, their controlled committees and committees that make contributions to candidates. Proposition 73 also prohibits candidates and treasurers from soliciting or accepting contributions which exceed the limitations. (Sections 85301-85303.)[3] Contributions which either in the aggregate or on their face exceed the contribution limits must be returned within 10 working days of receipt, or by the reporting deadline for the period in which the contribution is received, whichever is earlier, or in the case of a late contribution, within 24 hours of receipt. (Regulation 18531.)

At its June 5, 1989, meeting, the Commission adopted Regulation 18531.5 which requires cumulation of contributions from affiliated entities for purposes of the contribution limitations. The regulation states that contributions made by two or more entities must be cumulated if the same person or a majority of the same persons "in fact directs and controls" the decisions of the entities to make contributions or expenditures. (Regulation 18531.5(a).) In addition, business entities in a parent-subsidiary relationship and business entities with the same controlling (more than 50 percent) owner are considered one person unless the business entities act completely independently in their decisions to make contributions and expenditures. (Regulation 18531.5(b).)

Affiliated entities which qualify as "major donor" or "independent expenditure" committees pursuant to Section 82013(b) or (c) are required to notify recipients when their contributions must be cumulated with contributions made by another entity. (Regulation 18428(d).) Committees pursuant to Section 82013(a) ("recipient committees") currently are not required to provide such notification.

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[3] Candidates and their committees may receive up to $1,000 per fiscal year (July 1-June 30) from "persons" as that term is defined in Section 85102(b), up to $2,500 per fiscal year from "political committees" as defined in Section 85102(c), and up to $5,000 per fiscal year from "broad based political committees" as defined in Section 85201(d). Political committees and broad based political committees may receive up to $2,500 per fiscal year from any contributor.

Candidates and committees must file periodic campaign disclosure statements and must itemize contributors from whom they receive $100 or more in a calendar year. (Sections 84200, 84200.5 and 84211.) Candidates, their committees and committees that make contributions to candidates also must disclose the cumulative amount of contributions received from contributors of $100 or more during both the calendar year (January 1-December 31) and the fiscal year (July 1-June 30). (Section 84211; Regulation 18432.)

Candidates and committee treasurers are also required to "keep such detailed accounts, records, bills and receipts that are necessary to prepare campaign statements and to comply with" the Act's campaign disclosure provisions. (Section 84100.) These accounts are not required to contain detail as to contributions received or expenditures made of less than $25 other than the date and total amount of such contributions or expenditures. (Regulation 18401.) With regard to required records, Regulation 18401(a) states:

> Good faith compliance with the requirements of the record keeping manual issued by the Fair Political Practices Commission shall preclude any action for a violation of the record keeping provisions of this regulation.

The recordkeeping manual, issued as part of the 1989 "Information Manual on Campaign Disclosure Provisions of the Political Reform Act" (the "Information Manual"), requires candidates and committees to keep detailed information regarding contributions of $25 or more, and to prepare individual records for contributors of $100 or more. (Information Manual, pages 53-56.)

When a committee receives or obtains information that certain contributors' funds must be cumulated, that information clearly must be maintained in the committee's records for disclosure purposes. Perhaps the best place to record such information would be on the individual contributor records, which could be reviewed as new contributions are received.

In addition to the recordkeeping requirements, Regulation 18427 specifies the duties of candidates and treasurers with regard to campaign statements and requires committee treasurers to:

> ...cause to be checked, and, if necessary, corrected, any information in campaign statements which a person of reasonable prudence would question based on all the surrounding circumstances of which the treasurer is aware or should be aware by reason of his or her duties under this regulation and the Act.

In a comment provided at the end of Regulation 18427, the Commission has stated:

> ...The circumstances that trigger a duty to inquire under this standard are limited to those actually known to the candidate or treasurer and to those of which he or she should be aware by carrying out his or her duties under the Act and regulation. They do not include circumstances a candidate or treasurer "might" or "should have known" if he or she had gone beyond his or her required duties. For example, Mr. Jones may give Mr. Smith $100 in cash and instruct him to write a check to the candidate's controlled committee and to conceal the true source of the contribution. The committee reports the contribution as received from Smith. If neither the candidate nor treasurer has any knowledge concerning the questionable nature of the contribution and neither, through performance of their respective duties (such as monitoring campaign records or reviewing campaign statements), could have learned any facts that would lead one to question the contribution, the candidate and treasurer have no duty of inquiry with respect to the contribution. There is no duty of inquiry even though if Smith were asked he would have revealed the true source of the funds.

Clearly, there is no requirement that committee treasurers inquire with regard to each contribution whether the contributor's funds must be cumulated with any other funds for purposes of the contribution limits. However, treasurers certainly must review the records which are required to be maintained for purposes of determining whether particular contributions must be cumulated. In addition, there may be other factors which would require the treasurer to inquire regarding particular contributions.

> ...It is not possible in a regulation to describe with particularity every factual situation that might trigger such an inquiry since the variety of circumstances that could arise with respect to any particular campaign transaction are endless. By way of example, however, such circumstances might include the following in the case of a contribution: The size of the contribution, the reported source, the likelihood of that source making a contribution of the size reported, the circumstances surrounding receipt, and the manner in which the contribution is recorded in campaign records.
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> Comment to Regulation 18427.

Using the above comment as a guideline, a committee treasurer may have a duty to inquire whether certain contributors' funds must be cumulated. For example, if a committee received a $1,000 contribution from the John Smith Corporation and received another $1,000 contribution from John Smith, it appears reasonable that the treasurer should inquire whether Mr. Smith's contributions

must be cumulated with the contributions made by the John Smith Corporation.[4] However, in most instances, the treasurer's obligation to cumulate contributions from affiliated contributors is a matter of recording, maintaining and reviewing information which is provided to the committee.

I hope this letter has been helpful. Please call me at (916) 322-5662 if you have additional questions.

Sincerely,

Kathryn E. Donovan
General Counsel

Carla J. Wardlow

By: Carla J. Wardlow
Assistant Chief, Technical
Assistance & Analysis Division

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[4] Your letter indicates that the Commission has imposed what some believe to be nearly impossible burdens on treasurers to obtain and disclose cumulative contributions of related contributors. With regard to the cases you have cited, we disagree. In re Fitzmorris, et al. (No. SI-83/14) did not involve the duties of treasurers. In re Mezzetti, et al. (No. FC-86/361) and In re Scott (No. 88-151) both involved multiple contributions from the same contributors, some of which were made in one day, contributions of $99 made on the same date by spouses using a single account, and other similar circumstances.

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TELEPHONE (916) 446-6752

FILE NUMBER

June 9, 1989

Ms. Kathryn Donovan
General Counsel
Fair Political Practices Commission
428 J Street, Eighth Floor
Sacramento, CA 94814

Re: Request for Written Advice or Opinion

Dear Ms. Donovan:

The undersigned is a Treasurer for, or advises Treasurers for, approximately 150 recipient committees that have filing obligations under the Political Reform Act ("the Act").

Under sections 81004 and 84104 of the Act and Commission Regulation 18401 (2 CCR 18401), the Treasurer of a committee is required to maintain adequate accounts, records and receipts and to use reasonable diligence in complying with the committee's reporting obligations under the Act. This includes compliance with Regulations 18531 and 18531.5, which provide respectively that (1) a committee shall not deposit any contribution that exceeds the contribution limits for contributors to the committee under Gov't Code section 85301 et seq. and (2) certain persons and entities may be subject to one contribution limit if deemed to be "affiliated entities" under Regulation 18531.5 subsections (a) and (b). Taken together, these two regulations require that a Treasurer determine whether two contributors' contributions must be counted together before depositing a check from one of a group of affiliated contributors.

This of course requires knowledge of who are such affiliated entities. Regulation 18531.5 deems two or more persons and entities to be affiliated, and therefore subject to one contribution limit, if one person or a majority of the same persons in fact directs and controls the contribution decisions of another business entity or entities. In addition, for business entities that are in a parent/subsidiary relationship, such entities would be considered affiliates unless the entities

could prove they acted "completely independently" of one another in making contribution decisions.[1]

Currently, the Commission has not established standards, other than the general duties imposed on Treasurers noted in the second paragraph above, for determining which contributors may be "affiliated."

Regulation 18428 relative to campaign contribution disclosure, imposes the burden of notification on affiliated contributors to disclose their affiliation relationships, [2 CCR 18428(d)]. However, this requirement only applies to a limited class of contributors, major donors, who have contributed $10,000 in a calendar year or more to all state and local candidates and ballot measure committees. No similar regulation has been adopted with respect to contributors other than major donors. On the other hand, Proposition 73 limits affect $1,000, $2,500 and $5,000 contributors, a much larger universe of donors.

It should also be noted that the Commission in several recent enforcement decisions has imposed substantial (some believe nearly impossible) burdens on Treasurers to obtain and disclose cumulative contributions of related contributors. (See, e.g., In re A.G. Fitzmorris M.D., et al (8/24/86); In re Mezzetti et al (10/14/87); In re Scott (5/5/89)).

Taken together all of these factors leave Treasurers in a very difficult position for the reasons set forth below.

1. Generally, the Treasurer of a recipient committee has a very limited or no independent knowledge of a contributor's status and business relationships. The Treasurer's information is often limited to the information on the face of the check or response device (which may but does not always include a business employer's name and occupation). However, coincidental information that an employer may contribute to the same committee as one of its employees is not the kind of information that should require the Treasurer to avoid depositing a check that

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[1] Regulation 18531.5 subsections (c) and (d) [2 CCR 18531.5(c) and (d)] impose similar affiliation rules for donors of gifts and honoraria subject to the provisions of Gov't Code section 85400. In contrast to the rules affecting affiliated contributors, however, Regulation 18728(d) [2 CCR 18728(d)], as amended on June 6, 1989, imposes specific notification requirements upon affiliated donors to advise the recipient of their status. Presumably, the recipient of such gifts or honoraria would have a defense of lack of knowledge or lack of notice to any violation of the gift and honoraria limits.

appears on its face to be from the employee's personal bank account.

2. The enforcement cases described above have used a "hindsight" test to determine affiliation relationships that included information not readily available to the Treasurer in those cases.

3. The Treasurer is required by Regulation 18531 to return an "over limits" check within a minimum of 24 hours (in some situations) or at most 10 days. Where there is merely a suspicion of a connection, however tenuous, with a previous contributor, I cannot adequately describe how much chaos, confusion and difficulty this will create for campaign treasurers if they must hold or return checks.

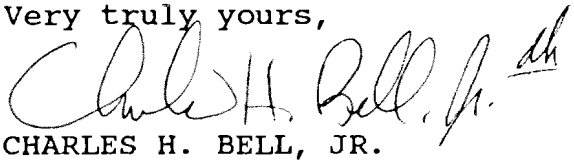
4. Even if a Treasurer were able to obtain timely and complete information about affiliation relationships for literally hundreds of contributors, there is a great likelihood that despite taking extraordinary efforts to monitor the limits, some "over limits" contributions will be missed, resulting in violations of the Act. It is likely that all Treasurers will face this situation frequently.

This is to request Commission advice on what it believes are a Treasurer's obligations generally to obtain affiliation information from contributors, and what, if any, actions may be taken to comply with the Treasurer's duty to use "reasonable diligence" in the preparation of campaign reports and to avoid violation of the prohibition against deposit of contributions that exceed affiliated contributors' contribution limits.

It may also be fruitful to consider adopting a regulation that imposes some burden on the donor to inform the recipient of any affiliation relationships and that affords the recipient a defense if there is no knowledge or notice given of the affiliation relationship.

Thank you very much for your assistance in this regard.

Very truly yours,



CHARLES H. BELL, JR.

CHB:ss

84-370

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Thank you very much for your assistance in this regard.

Very truly yours,

CHARLES H. BELL, JR.

CHB:ss

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Practices Commission

June 23, 1989

Charles H. Bell, Jr.
Nielsen, Merksamer, Hodgson,
Parrinello & Mueller
770 L Street, Suite 800
Sacramento, CA 95814

Re: Letter No. 89-370

Dear Mr. Bell:

Your letter requesting advice under the Political Reform Act was received on June 19, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact me directly at (916) 322-5662.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to the information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Jeanne Pritchard
Chief Technical Assistance
and Analysis Division

JP:plh